Sabah Bank Bhd v Syarikat Bintang Tengah Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2-23-1872-88
SITI NORMA YAAKOB J
4 AUGUST 1992

Bankruptcy *— Capacity of bankrupt — Application by bankrupt to set aside default judgment — Whether bankrupt had locus standi to make application — Whether bankrupt required sanction of Official Assignee to file application — Bankruptcy Act 1967 s 38(1)(a)*

On 22 September 1989, the plaintiffs entered judgment in default against the third defendant. The third defendant was adjudged a bankrupt on 3 May 1991. On 17 June 1991 the third defendant applied to set aside the default judgment ('the application'). The plaintiffs raised a preliminary objection that since the third defendant was still an undischarged bankrupt, the third defendant needed the sanction of the official assignee ('the OA') to file the application. The plaintiffs therefore argued that as the third defendant had to obtain the OA's sanction under s 38(1)(a) of the Bankruptcy Act 1967 ('the Act'), the third defendant had no locus standi to make the application. The senior assistant registrar dismissed the preliminary objection and the plaintiffs appealed to the High Court. The third defendant argued that s 38(1)(a) of the Act required the obtaining of the OA's sanction in any action brought by the bankrupt but such a provision did not apply to applications such as was in this case.

Held, allowing the appeal:

(1) Once receiving and adjudication orders are made, the bankrupt's estate vests with the OA and under s 38(1)(a) of the Bankruptcy Act 1967, the OA must first be consulted as any action intended by the bankrupt may be detrimental to his creditors. The only exception where no sanction is required from the OA is when the bankrupt files an action for damages for injury to his person or when he questions his status by filing an application under ss 92(1) or 105(1) of the Act.
(2) Section 38(1)(a) of the Act is wide enough to include the filing of an application to set aside a default judgment.
(3) Accordingly, the third defendant must first obtain the OA's sanction and since this was not done, he had no locus standi to file the application.

[Bahasa Malaysia summary

Pada 22 September 1989, plaintif telah memasukkan penghakiman ingkar terhadap defendan ketiga. Defendan ketiga telah dihukum bankrap pada 3 Mei 1991. Pada 17 Jun 1991 defendan ketiga telah memohon mengetepikan penghakiman ingkar itu ('permohonan itu').

Plaintif telah menimbulkan suatu bantahan permulaan bahawa kerana defendan ketiga masih seorang bankrap yang belum dilepaskan, defendan ketiga memerlukan persetujuan pegawai pemegang serahhak ('pegawai itu') untuk memfailkan permohonan itu. Plaintif oleh kerana itu berhujah bahawa kerana defendan ketiga harus memperoleh persetujuan pegawai itu di bawah s 38(1)(a) Akta Kebankrapan 1967 ('Akta itu'), defendan ketiga tidak mempunyai locus standi untuk membuat permohonan itu. Penolong kanan pendaftar menolak bantahan permulaan itu dan plaintif telah membuat rayuan kepada Mahkamah Tinggi. Defendan ketiga berhujah bahawa s 38(1)(a) Akta itu mengkehendaki persetujuan pegawai itu dalam sebarang tindakan yang dibawa oleh si bankrap tetapi peruntukan seperti itu tidak terpakai kepada permohonan-permohonan seperti yang di dalam kes ini.

Diputuskan, membenarkan rayuan itu:

(1) Apabila perintah penerimaan dan penghukuman dibuat, estet si bankrap terletak hak pada pegawai itu dan di bawah s 38(1)(a) Akta itu, lebih dahulu si bankrap mesti berunding dengan pegawai itu kerana sebarang tindakan yang dicadangkan oleh si bankrap boleh jadi memudaratkan pemiutang-pemiutangnya. Kekecualian yang tunggal di mana tiada persetujuan dikehendaki daripada pegawai itu, adalah apabila si bankrap memfailkan suatu tindakan untuk ganti rugi bagi kecederaan kepada dirinya sendiri atau apabila beliau menyoal kedudukannya dengan memfailkan suatu permohonan di bawah ss 92(1) atau 105(1) Akta itu.

(2) Seksyen 38(1)(a) Akta itu adalah cukup luas untuk meliputi pemfailan suatu permohonan untuk mengetepikan suatu penghakiman ingkar.

(3) Oleh kerana itu, lebih dahulu defendan ketiga mesti memperoleh persetujuan pegawai itu dan kerana ini tidak dilakukan, beliau tidak mempunyai locus standi untuk memfailkan permohonan itu.]

[*Editorial Note*: The third defendant has appealed to the Supreme Court vide Civil Appeal No 03–16–1992.]

Legislation referred to

Bankruptcy Act 1967 ss 38(1)(a), 92(1), 105(1)
Rules of the High Court 1980 O 13 r 8, O 83 r 4

Sulaiman bin Osman (*Hisham Sobri & Kadir*) for the plaintiffs.
Harjit Singh Sandhu (*Harjit Sandhu & Co*) for the third defendant.

Cur Adv Vult

Siti Norma Yaakob J: Before the senior assistant registrar, a preliminary objection was raised by the plaintiffs on the third defendant's application to have a judgment in default entered against him on 22 September 1989 set aside. The preliminary objection was whether the third defendant, a bank-

rupt, had the locus standi to make the application. The senior assistant registrar dismissed the objection and the plaintiffs appealed to me against that dismissal.

It is not disputed that the third defendant was adjudged a bankrupt on 3 May 1991 and when he applied to have the judgment in default set aside on 17 June 1991, he was and still is an undischarged bankrupt. Under such circumstances, it is the plaintiffs' contention that the third defendant needed the sanction of the official assignee under s 38(1)(a) of the Bankruptcy Act 1967 to file the application. Since no such sanction had been obtained, he had no locus standi to make the application.

In rebuttal, the third defendant maintains that s 38(1)(a) limits the obtaining of the sanction to any action to be brought by the bankrupt but not an application such as the one that he has filed in these proceedings. To that extent, the third defendant distinguishes an action from an application and since the present proceedings relate only to an application, s 38(1)(a) does not apply.

It must be remembered that proceedings before the senior assistant registrar, when the preliminary objection was raised, were not pursuant to any provision under the Bankruptcy Act or the Bankruptcy Rules. On the contrary, it was an application under O 13 r 8 read together with O 83 r 4 of the Rules of the High Court 1980.

It must also be remembered that once receiving and adjudication orders are made, the bankrupt's estate vests with the official assignee and it is for this very reason that s 38(1)(a) was enacted, as it only stands to reason that the official assignee must first be consulted as any action intended by the bankrupt may well be detrimental to his creditors. The only exception is when the bankrupt files an action for damages for injury to his person or when he questions his status by filing an application under s 92(1) or s 105(1) of the Bankruptcy Act 1967, in which case, no sanction from the official assignee is required.

In this case, it is true that the third defendant had filed an application as opposed to an action but nonetheless, I consider that s 38(1)(a) is wide enough to include the filing of an application to have the default judgment set aside. Under such circumstances, he must first of all obtain the sanction of the official assignee and since this was not done, he had no locus standi to file the application. On that finding, I had allowed the plaintiffs' appeal with costs.

Appeal allowed.

Reported by Wong Kian Kheong